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Supreme Court of the United States

October Term, 1945.

No. 403

MADGE CHRISTIE,

Plaintiff,

AGAINST

GEORGE M. COHAN, IRVING BERLIN, DENNIS F. O'BRIEN, Executors, and KATHLEEN NOLAN HARRIS, Executrix of the Estate of SAM H. HARRIS, GEORGE S. KAUFMAN and EDNA FERBER,

Defendants.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Supporting Brief.

MAX R. SIMON,
Counsel for Petitioner.

FREDERICK E. WEINBERG,
Of Counsel.

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POINT I.—In a plagiarism suit, where the matter duplicated is so significant or so multiple as to render the supposition of a coincidence inconceivable, the Court will, despite the absence of direct testimony of copying, reverse a judgment in favor of the defendants, direct the en-

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try of judgment in favor of the plaintiff, and remand the cause to the lower Court for proceedings necessary to fix damages, attorneys' fees, etc. 32

CASES CITED.

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Supreme Court of the United States

OCTOBER TERM, 1945.

MADGE CHRISTIE, *Plaintiff,* AGAINST GEORGE M. COHAN, IRVING BERLIN, DENNIS F. O'BRIEN, Executors, and KATHLEEN NOLAN HARRIS, Executrix of the Estate of SAM H. HARRIS, GEORGE S. KAUFMAN and EDNA FERBER, *Defendants.*	No.....

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Madge Christie, respectfully shows:

Summary Statement of the Matter Involved.

The Circuit Court of Appeals for the Second Circuit unanimously affirmed a judgment of the United States District Court for the Southern District of New York which awarded judgment in favor of the defendants and dismissed the complaint ( ). The judgment of

affirmance was entered in the Circuit Court of Appeals on April 18, 1946 ( ). On July 13, 1946, Mr. Justice Reed signed an order extending the time for the filing of a petition for certiorari up to and including August 18, 1946, and the said order together with the application therefor were filed in the Supreme Court of the United States under date of July 18, 1946.

The complaint alleged a suit under the Copyright Law of the United States, claiming that the defendants had produced a play which had been copied or pirated from a play written by the plaintiff in conjunction with another and copyrighted with the Register of Copyrights in accordance with the Copyright Law (9-33).

The *ratio decidendi*, both in the District Court and in the Circuit Court of Appeals, was that the two plays were not sufficiently parallel to require a finding of piracy as a matter of law (67-90;).

Application has not been made for reargument, reconsideration or rehearing in respect of the decision of the Circuit Court of Appeals for the Second Circuit.

Petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case as the same appears in the United States Circuit Court of Appeals for the Second Circuit, together with the three copies of each of the two plays which were handed up to the Circuit Court of Appeals upon the submission of the argument in that Court.

Jurisdiction and Statement.

Jurisdiction to review this cause upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Question Presented.

The question presented may be viewed as a question of appellate procedure upon which a question of substantive law directly depends. The lower courts have either overlooked the many parallelisms between the two plays or, in the alternative, failed to draw the only inference of which those parallelisms admit. Whichever of these two faults occurred, a miscarriage of justice resulted.

Reasons Relied on for Granting the Writ.

This Court is requested to grant the writ for the following reasons:

The basic question is whether circumstantial evidence can ever be accorded a compulsive character. This Court and other appellate courts have invariably ruled that testimony which is clear and consistent cannot be disregarded, and that findings at variance therewith will be reversed as a matter of law. There is no valid reason for the failure to apply that doctrine to circumstantial evidence in a situation wherein its preponderant character is such as to make any factual interpretation but one incredible. In the case at bar, the parallelisms which the two plays present—in theme, in setting, in situations, and in dialogue—are so numerous and so distinctive as to render the supposition of coincidence incredible. The psychological compulsion thereby created must act as the source of a corresponding legal compulsion. If it were not so, we must countenance a system of fact finding which permits decisions to rest upon the supposition of miracles.

The refusal to accord compulsive character to circumstantial evidence injects an element of accident and instability into our jurisprudence which is inconsistent with the administration of justice.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated, New York, N. Y., August 15, 1946.

MAX R. SIMON,
Counsel for Petitioner.

FREDERICK E. WEINBERG,
Attorney for Petitioner,
450 Seventh Avenue,
New York 1, New York.

Brief in Support of Petition for Writ of Certiorari.

Statement.

The judgment was entered in the District Court of the United States for the Southern District of New York after trial before the Honorable Edward A. Conger, District Judge, without a jury (2-3).

Findings of Fact and Conclusions of Law (91-102);
Opinion of the Trial Court (67-90).

The judgment of affirmance was handed down by the Circuit Court of Appeals for the Second Circuit on April 18, 1946 ( ).

Judgment of affirmance ( );
Opinion of the Circuit Court ( ).

The Question in This Court.

This is a "plagiarism suit" brought by the plaintiff, as one of the authors and the assignee of her co-author of a copyrighted play enttiled "Thru The Looking Glass", against the co-authors and producer of the play "Stage Door" (9-33). The defendant Harris having died during the pendency of the action, the suit was continued against his estate. The answers of the defendants admit, and the Trial Court expressly found, that the play "Stage Door" was written by the defendants Kaufman and Ferber during the first half of 1936 and was produced by the defendant Harris shortly thereafter (95-6).

Appellant contends that the judgment is against the weight of the evidence. Among the findings complained of are those to the effect that the two plays "are entirely

dissimilar" and "that no part of the play 'Thru The Looking Glass' was used by defendants Edna Ferber and George S. Kaufman in the writing and preparation of the play 'Stage Door' " (99-100).

Appellant's contention rests upon the fact of accessibility plus a comparison of the respective scripts.

The Facts.

Plaintiff and one Renita Randolph wrote "Thru The Looking Glass" jointly (120-2). A copyright was obtained thereon on November 28, 1930 (123-4). Sometime later, Miss Randolph assigned her own rights to the play to the plaintiff (125-7; 811-813).

Early in 1931 Miss Randolph brought the script of the play to the defendant Harris at his office in the Music Box Theatre and left it with him in order to obtain his opinion (244-6). The records of the defendant Harris show that the play was returned to Miss Randolph sometime in 1933 (338). There was no record of the script having been received by Mr. Harris' office, although he conceded that such a record should have been made (id.).

Both the defendant Kaufman and the defendant Ferber admitted that they had been in the habit of using the office of the defendant Harris with considerable freedom (392, 429). Kaufman testified that, when he had to do any casting or directing at the Music Box Theatre, he would use Mr. Harris' office as his own while the latter was "out to lunch or something" (392). Kaufman stated that he could not recall a single play produced at the Music Box Theatre in which he was not interested (397). It also appeared that he directed his own plays and would usually sit in on their readings conducted in Harris' office (371-5). Finally, he also used the office for his mailing address (364-5).

The defendants Kaufman and Ferber testified that they had written "Stage Door" during the year 1936 (383-4,

420). The business of casting, readings for the play, etc. took place at the office of the defendant Harris (371). The defendant Kaufman was present (id.). Whether the defendant Ferber was also present on all those occasions is not clear (373).

Sometime during October of 1937 the plaintiff saw a performance of the motion picture version of "Stage Door" (158-9). The very next day she bought the book and read it (160). Two months later she went with Miss Randolph to see the defendant Harris and protested to him that "Stage Door" had been taken directly from the plaintiff's script (136-141). The answer of the defendant Harris, as given in his own words upon his examination before trial, was: "I assured her that Mr. Kaufman and Miss Ferber were honest people and would not think of writing a play about any subject which was not original to them; they're too important and can't afford to do that" (341-2). He did not, however, express any surprise at Miss Randolph's assumption that the defendants Kaufman and Ferber had acquired access to the plaintiff's script through his office (id.).

When the plaintiff and Miss Randolph insisted in their protestations, Harris proposed that the argument should be submitted to the Dramatists Guild, and that the decision of that board should be accepted as final (141). The two ladies agreed, but the Dramatists Guild refused even to consider the matter (142-3). The defendant Kaufman was Vice-President of the Guild (403). A correspondence then ensued between Miss Randolph and the defendants which brought no results and precipitated the institution of this suit (814-825).

The balance of the statement of facts will be confined to an examination of the two plays.

A. The Themes, Characters and Incidents Which Are Utilized in the Unfolding of the Plots.

This subdivision is confined to matters of fundamental play structure. Alone, the identities considered hereunder might be insufficient to support the suit. Their significance will become apparent later. It will then be manifest that this identity in fundamental structure is but the base of a pattern of continuous identity which extends into every corner of the two dramatic edifices.

Plaintiff's play is a three act drama. The play opens at a boarding house in the West Forties of New York City. Its name is the Drama Club. The Club is exclusively used by girls aspiring to theatrical careers. Although the action of the play is confined to the girls at the Club and their friends, the first Act is the only one which actually takes place in the Club itself.

With the possible exception of the star, each of the girls fails to attain her goal of a theatrical career. In each instance but one, these failures are depicted negatively—that is, by exhibiting them as caught in an endless treadmill—rather than by anything affirmatively catastrophic. The single exception is the star's former roommate, who commits suicide (there is another suicide by a girl who does not reside at the Club).

The star's own salvation is neither complete nor the direct result of any outstanding virtue or ability of her own. A theatrical playwright falls in love with her and then writes a play in which she appears as the star. For a while she succeeds in her theatrical ambition with his aid. Toward the end, a combination of events forces her out of the theatre and the play closes upon a prospect of domestic felicity.

Defendants' play is a three act drama. The setting of all three Acts is at a boarding house in the West Fif-

ties of New York City. The name is the Footlights Club. The Club is exclusively used by girls aspiring to theatrical careers.

With the possible exception of the star, each of the girls fails to attain her goal of a theatrical career. In each instance but one, these failures are depicted negatively—that is, by exhibiting them as caught in an endless treadmill—rather than by anything affirmatively catastrophic. The single exception is the star's new roommate, who commits suicide.

The star's own salvation is neither complete nor the direct result of any outstanding virtue or ability of her own. A theatrical producer falls in love with her and then buys a play which is intended to star her. Although she then encounters exactly the same difficulties as those which had confronted her prototype in the plaintiff's play, she finds a kinder fate. At the end of the play she faces a future which promises her not only a life of domestic bliss, but also the coveted theatrical career.

B. The Parallelism Between the Principal Characters in the Two Plays.

Each of the principal characters of the defendants' play is directly derived from a prototype in the plaintiff's play. Practically all the references to the character's antecedent history and practically all of the stage dialogue can be traced to identical references or dialogue in the plaintiff's play. Finally, while in most instances the character in the defendants' play can be linked to a single prototype in the plaintiff's play, we shall find certain exceptions in which this one-to-one relation has been discarded. In those instances we shall find, either, that a single character in the plaintiff's play has been used as the basis for two separate characters in the defendants' play, or that two characters in the plaintiff's play have been fused into one character in the defendants' play.

We shall now examine the principal characters from the two plays with some care.

Billie-Katherine Calvert (Plaintiff's Play).
Terry Randall (Defendants' Play).

These are the stars of the two plays. Their parallelism includes physical appearance, origin and early history, and the manner in which the success of each is attained through the events depicted in the play. We shall consider these aspects of identity severally.

Each of the girls is tiny (Ex. 2, Act I, p. 44; Ex. 3, p. 32).

Billie had been born and raised in Tennessee and had been projected into a New York theatrical atmosphere by a stage-struck but inhibited mother. In other words, Billie represented her mother's quest for vicarious fulfillment in a career which Billie's mother herself had been denied by the bigotry of her own mother (Ex. 2, Act I, pp. 20, 22). Terry had been born and raised in Indiana and had also been projected into a New York theatrical atmosphere in consequence of the ambition of her stage-struck but inhibited mother (Ex. 3, pp. 57, 81-2).

Each of these girls, alone of the entire group, realizes a measure of fulfillment through her relation with a theatrical playwright or producer respectively (Ex. 2, Act II, p. 16; Ex. 3, p. 227). For a more precise statement of the exact sequence of events, see C, *infra*.

Cleo Norton (Plaintiff's Play).
Kaye Hamilton (Defendants' Play).

In Act I of each play, the star's roommate moves out and another one moves in. Cleo is the outgoing roommate of the plaintiff's star, while Kaye is the incoming roommate of the defendants' star. Their parallelism includes origin and antecedent life, a resultant bitterness,

and the fact that each, upon losing her job, commits suicide by taking poison.

Each of these girls had gone on the stage as a child, then left the stage for marriage with a rich playboy husband, and finally returned to the stage in order to escape from the husband's eccentricities (Ex. 2, Act I, p. 12, Act II, p. 14; Ex. 3, pp. 83-4).

The orientation of each toward the events of the play is depicted in a scene in which she exhibits to her roommate (in each case, the star of the play) an attitude of cynical disillusionment wherein her entire future presents itself to her as but a blind alley (Ex. 2, Act III, p. 12, *et seq.*; Ex. 3, pp. 83-5).

Each girl, upon losing her job, commits suicide by taking poison (Ex. 2, Act III, pp. 11-12, 16; Ex. 3, pp. 137-141).

Priscilla James (Plaintiff's Play).
Bernice Niemeyer (Defendants' Play).

Each of these girls submits her friends to a continuous barrage of trivial questions, the answers to which are either unimportant or extremely obvious. These perfunctory questions and answers total 22 in the case of Priscilla and 32 in the case of Bernice (Ex. 2, Act I, pp. 9-14, 18, 26-9; Ex. 3, pp. 4-9, 17, 22-3, 26, 52, 77, 119, 120, 179, 198). In each play this habit gives rise to an expression of annoyance by one of the other girls (Ex. 2, Act I, p. 10; Ex. 3, p. 7).

Each of the girls has failed in her attempt to obtain employment from the managers (Ex. 2, Act I, p. 13; Ex. 3, p. 30). Each exhibits the characteristics of the jackal by constantly seeking employment from the left-over opportunities of the other girls. Thus, at one point Priscilla telephones to someone who had apparently been seeking to get an opening for the star (Ex. 2, Act I, p. 9); at another point she asks one of the girls if her

company needs an understudy (Ex. 2, Act I, p. 12); subsequently she decides to look for a job at the same office by which the star had been interviewed (Ex. 2, Act I, p. 18). In the same manner, Bernice asks two of the other girls whether they had been seeing managers, whether anybody was casting and the name of the manager by whom they had been interviewed (Ex. 3, p. 6); she repeats this inquiry to one of the other girls upon her entrance (Ex. 3, p. 8); later, she indicates her intention to seek an engagement from the very office by which the star had been interviewed (id.); subsequently, she implies that she is particularly interested in knowing what the star is "up to" (Ex. 3, p. 26); she repeats this same conduct a little later (Ex. 3, p. 28); finally, she even goes so far as to buttonhole the star's boy friend and try to impress him in the desire of obtaining theatrical employment through him (Ex. 3, pp. 51-2).

In each play the jackal aptitude of the girl goes beyond that of simply seeking the cast-off jobs of her friends, and includes that of willingly receiving their clothes (Ex. 2, Act I, p. 9; Ex. 3, p. 198).

Each of these girls expresses the desire to get child parts (Ex. 2, Act I, p. 9; Ex. 3, p. 7).

Finally, in the face of the manifest futility which had attended each girl's quest for employment, each holds on to the search with a pitiful tenacity (as though the search itself were precious), insisting that she will not give up (Ex. 2, Act I, p. 29; Ex. 3, p. 179).

These girls exhibit the unconscious groping of defeated individuals for a sense of security. That quest adopts divers forms, but the singleness of the motif is readily discernible. The many insistent unimportant questions asked by each represents the desire to be noticed, pursued at the very simplest level. While the effort to obtain jobs by searching among the leftovers of her friends is an intelligible device which stands in no need of psycho-

analytic interpretation, the willingness to use the clothes of the other girls requires a deeper explanation. The girl's need for clothes must clearly have been of a lower order of insistence than her need for a job. Accordingly, the true explanation of the clothes borrowing is probably to be found in the circumstance that, the girl having become the jackal in seeking a job, a pattern of behavior was established which thereupon continued in a sphere of activity in which it would not otherwise have originated.

Cordelia Brown (Plaintiff's Play).
Louise Mitchell (Defendants' Play).

Each of these girls is older than the other girls at the Club (Ex. 2, Act I, p. 12; Ex. 3, p. 27). Each has had a rather long but unsuccessful apprenticeship in the show business (id.). Each, disillusioned, wants to quit (Ex. 2, Act I, p. 13; Ex. 3, pp. 26-7).

Neither girl appears in the second act.

In the third act of the plaintiff's play Cordelia, returning from Europe, advises the star that "you can pull up the stakes, but you'll leave your roots here" (Ex. 2, Act III, p. 2, *et seq.;* Act III, p. 14). In the third act of the defendants' play Louise, returning to the Club after an unsuccessful attempt to make a go of it in a small community (Ex. 3, pp. 98-101), informs the other girls how wonderful it is to come back: that "I haven't been so happy in years" (Ex. 3, p. 177).

The parallelism between these two roles is clear. The sombreness of the star's background is highlighted by this older girl who, though she must always fail of her search for theatrical success, lacks the emotional flexibility to adjust herself to another way of life. Nor is this parallelism simply one of theme or idea. All the implements employed to represent that idea on the stage (the girl's age, her long theatrical apprenticeship, her desire and actual

attempt to find happiness elsewhere, her return to Broadway, and her final avowal that she can be happy only in the search for a Broadway theatrical career) find an exact duplication.

Xenia Yolta (Plaintiff's Play).
{Olga Brandt
{Pat Devine (Defendants' Play).

The role of Xenia forms the basis of two derived roles in the defendants' play. The main role derived from Xenia is that of Olga Brandt. We shall see, however, that some of the attributes of Xenia have been used by the defendants for Pat Devine.

Xenia and Olga are Russian girls who appear on the stage at the very beginning in each play (Ex. 2, Act I, p. 3; Ex. 3, p. 4). Each has been laboring for a considerable time to acquire perfection in a specialty (for Xenia, dancing—for Olga, piano) which marks her as the Carnegie Hall type rather than the ordinary legitimate actress (Ex. 2, Act I, pp. 5, 8; Ex. 3, p. 10). Each has been marking time in her pursuit for a higher professional success by taking employment in a nightclub or vaudeville (Ex. 2, Act I, pp. 5-10; Ex. 3, pp. 10, 44). Each speaks of her job derisively (id.). Each practices her art on the stage during the action of the play (Ex. 2, Act I, p. 24; Ex. 3, pp. 4, 176). Each masks a sense of discouragement beneath a thin layer of cynicism (Ex. 2, Act I, p. 4; Ex. 3, pp. 10, 101). Each, more than any of the other girls, exhibits a zest for food. Thus, Xenia constantly interrupts the other girls with her insistence about going into the dining room (Ex. 2, Act I, pp. 25, 27), while Olga "storms into the dining room" immediately upon the announcement that dinner is ready and comes out only at the very last minute before the dinner period is over (Ex. 3, pp. 10, 9, 44-5).

These girls present a parallelism both in the type of personality which they exhibit and in the attributes presented in order to exhibit it. For the other girls at the Club, simply finding employment—any kind of employment on Broadway—would have been the end-all of their ambitions. Yet, with the exception of the stars in the two plays, all have failed and seem perpetually doomed to failure. The two Russian girls, alone, suffer under an ironic curse. Aspiring to something higher than a mere job on Broadway, they alone suffer from the curse that, although they succeed in the respect in which all the other girls fail, they are frustrated in their special aspirations to realize something higher.

An additional clue to the fact that Olga was modelled upon Xenia rests upon another consideration. Such a girl would unconsciously have attempted to cope with her spiritual starvation by a preoccupation with food. It is unlikely, however, that anyone other than a psychoanalyst would have been conversant with that neurotic symptom or have utilized it in exhibiting the personality. The utilization of that attribute is probably to be accounted for by the circumstance that the character herself was based upon someone whom the author of the play had known in real life. But, as against the supposition that the authors of each play happened to know such a personality and then happened to use that personality in the depiction of this particular character on the stage, it is far more probable that the person in real life had been known and used by the author of the plaintiff's play which thereupon became the model for the parallel personality exhibited in the defendants' play.

A small part of the dialogue and stage business belonging to Xenia has been left out of the character of Olga, and assigned instead to Pat Devine. Perhaps these aspects concern themselves less with character parallelism than with a parallelism of stage business and colloquy.

However characterized, these matters will briefly be described.

Both Xenia and Pat punctuate their conversations with the others by practicing dance steps (Ex. 2, Act I, p. 24; Ex. 3, pp. 72, 167-8, 192). Each indicates having difficulty in finding an opportunity to exhibit her talents to a producer (Ex. 2, Act I, p. 8; Ex. 3, p. 48). Each has difficulty in finding appreciation from men who are apparently more interested in sex (Ex. 2, Act I, p. 6; Ex. 3, p. 49).

Robert Wainwright (Plaintiff's Play).
{David Kingsley
{Keith Burgess (Defendants' Play).

Wainwright is the leading man of the plaintiff's play. He is presented as exhibiting two contrasting, if not conflicting, personalities. In one of these personalities, his orientation toward the star is that of maturity and power; it is to him that her professional career and home life are both to be entrusted. In this guise he is presented as the successful playwright (Ex. 2, Act I, pp. 33-4). All of the inmates of the Club fawn upon him for his favor, although it is only the star herself who wins it (Ex. 2, Act I, pp. 36-40). Elsewhere in the play Wainwright is presented in the form of a somewhat showy juvenile: he seems anxious to impress the girls at the Club through a parade of sophomoric "wise cracks" (Ex. 2, Act II, pp. 3 to 10). As the play evolves, the "man of the world, sense of power in reserve" characteristic succumbs to the juvenile, thus nicely complementing the impulse of the star to mother her male (Ex. 2, Act II, pp. 17 *et seq.*).

The character of Wainwright has been broken up by the defendants and assigned in part to Kingsley and in part to Burgess. Kingsley is a big moving picture man whom all the girls woo in the hope of getting jobs (Ex.

3, pp. 48 *et seq.*). Burgess is then presented as "the kind of young man who never wears a hat" and who engages the girls in a session of "wise crack" repartee (Ex. 3, pp. 60-8, 146 *et seq.*). It is, of course, the "sense of power, man of the world" character whom the star ultimately selects.

Thus, although the material employed by the plaintiff in the character of Wainwright has been preserved by the defendants, they have chosen to split it up between two roles. Instead of using a single male lead to express both adult mastery and juvenile flippancy, separate roles were created for each.

The foregoing examination must be considered as preliminary. Parallelism of setting, theme and the evolution of the theme in terms of play structure, and parallelism of the personalities of the principal roles should be considered collectively as an identity of materials. We must now enter upon our consideration of the manner in which these substantially identical materials were weaved into the details of the play patterns. This examination requires an almost situation-to-situation inspection of the two plays.

The situation-to-situation inspection which now follows will be divided into two parts. Although the situations through which the character and destiny of the star are directly depicted might have been treated simply as so many instances in the situational parallelism of the plays as a whole, such an examination might have obscured a very significant parallelism in the treatment of the stars. The parallel treatment of the two stars is so significant as to warrant our turning the spotlight directly upon it. Accordingly, in the sub-divisions which now follow, we shall first consider the evolution of the roles of the two stars as separate features of the plays, and then set forth our situation-to-situation examination of the plays as a whole.

C. The Principal Events Which Directly Concern the Star.

In neither play does the star appear in the early part of the performance. In each play there is a telephone call for the star, and one of the girls answers that she is out interviewing the managers (Ex. 2, Act I, p. 7; Ex. 3, p. 8). In each play, while waiting for the star to put in her appearance, one of the girls remarks cynically that the star must eventually fail in her job quest (Ex. 2, Act I, p. 5; Ex. 3, p. 8). In the plaintiff's play, a girl asks: "Hasn't Billie-Katherine come in yet?" (Ex. 2, Act I, p. 9). In the defendants' play, a girl answers an inquiry about the star's whereabouts by stating: "She hasn't come in yet" (Ex. 3, p. 25).

In each play, the star's roommate, responding to an inquiry as to the star's whereabouts, states that the star had gone out "at dawn" (Ex. 2, Act I, p. 5) or "before I'm awake in the morning" (Ex. 3, p. 26). In each play the roommate then adds, using the exact words here quoted: "I thought" that the star would have returned sooner (Ex. 2, Act I, p. 5; Ex. 3, p. 25).

In each play the star's entrance is accented by the same device. The star's roommate had been getting ready to leave the Club and to leave town upon a note of despair. At precisely that point, the star's entrance is ecstatic and buoyant. Her very first words inform us that she had hurried back for fear that she would not be in time to see her roommate before she left. "Oh, Cleo, Honey, I'm mighty glad you're still here. I thought I'd never get back, and I was afraid you'd surely be gone" (Ex. 2, Act I, p. 14). "Louise! Dar-ling! I was so afraid you'd be gone" (Ex. 3, p. 28). Immediately thereafter each of the stars refers to her quest for the job, with this difference: that whereas the plaintiff's star had failed to get it, the defendants' star had at least temporarily been successful (Ex. 2, Act I, pp. 14-15; Ex. 3, p.

28). Thereupon each of the stars goes into a vivid description of her interview with the manager (Ex. 2, Act I, p. 15 *et seq.*; Ex. 3, p. 30 *et seq.*).

The narrations wherein each star describes her interview with the manager present certain differences; nevertheless, the features which they have in common are striking. In each play the star's narration is given in response to the identically worded inquiry: "What happened?" (Ex. 2, Act I, p. 16; Ex. 3, p. 31). Answering, each of the stars describes her success in having obtained an interview with the manager. Each one had obtained the interview just as the manager was about to leave his office (Ex. 2, Act I, p. 15; Ex. 3, p. 31). Each of the stars tells the girls about how smartly she had talked to the manager (Ex. 2, Act I, p. 16; Ex. 3, p. 31). Each narrates the strong sense of exultation which she had felt upon learning (in the case of the plaintiff's star, mistakenly) that she had landed the job (Ex. 2, Act I, pp. 16 to 17; Ex. 3, p. 32).

In each play the star's roommate delays her departure until the very last minute in order to hear the end of the story (Ex. 2, Act I, pp. 15, 18; Ex. 3, p. 29). Thereupon she takes her belongings and, in each case, departs by taxi to the tune of effusive goodbyes and promises to write (Ex. 2, Act I, pp. 18-19; Ex. 3, p. 29).

Act I of each of the plays presents four paralleling situations, juxtaposed, but in different sequences. In plaintiff's play, we first learn from the star that she has lost her job (Ex. 2, pp. 17-19). Next, one of the girls advises her to get out of the show business and go into the movies. The star answers: "Oh, no, I just couldn't. I just couldn't possibly do that" (Ex. 2, p. 20). Directly after this scene one of the girls advises the star to quit the show business and go home; and right after that the star informs the other girls about the manner in which she had been projected into the show business in order to

satisfy the ambition of her stage-struck, but inhibited mother (Ex. 2, pp. 21-2).

Defendants' play presents these identical scenes in different sequence. As in plaintiff's play, the first situation presented is the star's loss of her job (Ex. 3, pp. 74 *et seq.*). Next, however, is presented the scene in which one of the girls advises the star to quit the show business and go home (Ex. 3, p. 80). Directly after that, the star informs her girl friend about how she had been projected onto the stage in order to fulfill the aspirations of her stage-struck, but inhibited mother (Ex. 3, pp. 81-2). And, last of all, is shown the scene in which the star is advised to forsake a straight theatrical career for the movies. The star answers: "Oh, no." Then after one of the girls asks her: "What?" she concludes her reply with the statement: "I couldn't" (Ex. 3, p. 89). Her language in this colloquy almost directly follows the language of plaintiff's star (compare Ex. 2, p. 20).

The effect of these four paralleling scenes is that the two plays present the star to the audience in identical capsules. Although she has lost her job, she owes it to her mother's complexes not to quit—and "Oh, no—she just couldn't" go into the movies.

The close of Act II, Scene I, of the defendants' play parallels certain events which are described in Act III of the plaintiff's play. The star's boy friend (in the plaintiff's play, the male lead—in the defendants' play, the juvenile who ultimately fails to gain the star's favor) informs the star that he must meet certain people and break a dinner engagement which had previously been arranged for the two of them and certain mutual friends (Ex. 2, Act III, p. 10; Ex. 3, p. 136). The people whom he must meet are a theatrical man (in plaintiff's play, a backer—in defendants' play, a manager) and an actress who is to be cast in the very role which had originally been designed for the star herself (Ex. 2, Act III, pp. 5,

10; Ex. 3, pp. 132-3, 135). He must hurry back without a moment's delay in order to meet them at his own office (Ex. 2, Act III, p. 11; Ex. 3, p. 135). He tells the star that he will rush through the appointment in order to be able to rejoin her as soon as possible (Ex. 2, Act III, p. 10; Ex. 3, pp. 138-9).

This scene is punctuated by the entrance of the star's roommate. She tells the others that she is being replaced by another girl, and that she is now out of a job (Ex. 2, Act III, p. 12; Ex. 3, p. 137). The roommate leaves at about the same time that the star's boy friend goes to keep his appointment (Ex. 2, Act III, p. 13; Ex. 3, p. 138). A short time later the star is informed that her roommate had committed suicide by taking poison (Ex. 2, Act III, p. 16; Ex. 3, pp. 139-140).

Every single incident of this entire situation is exactly the same in each of the plays.

D. Some Additional Parallelisms of Situation or Event Which Have Not Already Been Set Forth.

One of the events which is most vividly depicted in each play is the visit which the male lead pays to the Club. These two portrayals will now briefly be compared.

In the plaintiff's play the male lead visits the Club in order to take the star to dinner (Ex. 2, Act I, p. 33). During his visit, the other girls openly woo him in the desire to get jobs (Ex. 2, Act I, pp. 35-40). His own behavior fairly exudes a continuous line of "wise crack" persiflage (id.). As one of the incidents, one of the girls refers to the bathroom with a kind of impudent bravado (Ex. 2, Act I, p. 38). Another incident is that he ascends the stairs to the private quarters of the girls in breach of a house rule and that, upon being admonished therefor by the house matron, he seeks to justify himself by stating that he was in search of theatrical talent (Ex. 2, Act I, p.

39). He finally leaves, taking the star to dinner (Ex. 2, Act I, p. 40).

The events which are described above as part of a continuous scene are broken up and distributed in different parts of defendants' play. As already stated, the plaintiff's male lead was split up in the defendants' play into two roles: a serious successful man of the world (David Kingsley) and a flippant juvenile (Keith Burgess). Each of these *alter egos* of the plaintiff's leading man visits the Club and these visits may now be described separately.

The visit of Kingsley most nearly duplicates the visit of the leading man in the plaintiff's play. He comes to call upon one of the girls (not the star) in order to take her to dinner; thereupon he is wooed by the other girls who expect to get jobs through him (Ex. 3, pp. 50-8). During his visit, he meets the star who coquettes with him with a kind of graceful reticence (Ex. 3, pp. 56-8). Finally, he goes out to dinner with the girl whom he had called to take (Ex. 3, p. 58).

Kingsley's visit to the Club differs from that of the male lead in the plaintiff's play in two respects. Some of the incidents described in the plaintiff's play are omitted, and some are changed. The omitted incidents will be considered in a moment. Concerning the incidents actually described, however, the two principal differences are these: that Kingsley had come to call upon one of the other girls and had met the star only by an apparent accident, and that his conversation was wholly free from the sophomoric tone which had characterized the male lead in the plaintiff's play. The reason and value of these two departures from the text of the plaintiff's play are clear. So far as the object of the visit was concerned, it was, of course, more dramatic to exhibit the interest of the two leads in each other as that interest emerged from their very first contact rather than to portray them as al-

ready acquainted. On the other hand, the omission from Kingsley's role of the cheap persiflage which had characterized the plaintiff's male lead was rendered possible by the fact that those characteristics were assigned by the defendants to a specially created juvenile. No sooner had Kingsley departed than that juvenile (Keith) called at the Club and took the star to dinner (Ex. 3, pp. 60-8). An examination of the dialogue of that juvenile upon his visit to the Club will reveal that the silly banter of the plaintiff's male lead, which had been denied expression in the role of Kingsley, finally came into its own in the role of Keith (id.).

In other words, if we would truly rediscover in the defendants' play the complete personality which the male lead had exhibited upon calling at the Club in the plaintiff's play, we must include in that examination the visits of both Kingsley and Keith.

It will now be noted that two of the incidents which occurred upon the visit of plaintiff's male lead were not used during either of the above visits of his *alter egos* in the defendants' play. One of those incidents was the broken house rule which produced the remonstrances of the house matron, and the visitor's explanation that his purpose was simply to get theatrical talent. Although that incident was not used by the defendants upon either of the visits to the Club to which we have been referring, it was repeated with precision in another part of defendants' play. At the very end of the play, Kingsley makes another visit to the Club, meets the star in violation of the rules, is admonished therefor by the house matron, and seeks to explain away his misconduct by stating that he was there on business (Ex. 3, p. 228). The other incident which was omitted by the defendants in the visits above described was the reference which one of the girls made to the bathroom. That incident also, however, was used by the defendants in another part of their play (Ex. 3, p. 35).

Accordingly, it must be clear that the male lead's visit to the Club in the plaintiff's play was employed by the defendants as their model for the visits of Kingsley and Keith and for the two other incidents elsewhere referred to.

Plaintiff's play depicts a scene of violence between a girl who is destined to commit suicide and her boy friend. She tries to take his revolver away, telling him that a revolver "has always given me the horrors" and that she will "drop it off the roof" (Ex. 2, Act II, p. 25).

In the defendants' play, the destined suicide describes such a scene while talking to the star. Her relation with her husband had given her "nights of terror". When he had brandished a revolver she had urged him to open the window and "throw the revolver at that lamppost" (Ex. 3, p. 83).

The significance of the common elements in these two scenes is accented by the unusual method of disposing of the revolver by simply flinging it away from the roof or house.

Each play contains a scene in which the male lead calls for the star to take her out to dinner, and she is preparing to put on a formal evening gown (Ex. 2, Act III, pp. 10, 14, 12; Ex. 3, p. 148). In each play the star greets him in a metaphor derived from the fable of Cinderella (Ex. 2, Act III, p. 12; Ex. 3, p. 148).

In each play one of the girls refers to the ability of a particular motion picture producer to transform unknown material into big stars. In the plaintiff's play the girl says: "He picks 'em in the rough and ripens 'em into stars" (Ex. 2, Act I, p. 8). In the defendants' play the girls say: "Nobody ever heard of 'em before he sent 'em out there" (Ex. 3, p. 48).

In one part of the plaintiff's play an incident is described, almost parenthetically, which has been developed by the defendants as an important element in the background of their play.

The plaintiff's play depicts a scene in which Billy-Kate (the star) has an understudy named Kittens. The understudy comments upon the humor of the situation derived from their contrasting statures: "She's little and dark, and I'm big and blond. Isn't it funny?" (Ex. 2, Act I, p. 44).

Defendants have expanded this suggestion in such a manner as to derive a maximum comic value. As in the plaintiff's play, two girls are presented with the same given name—Big Mary and Little Mary. Paradoxically, Big Mary is the little one and Little Mary is the big one (Ex. 3, p. 7). Moreover, the concept of inappropriateness is expanded by the presentation of a scene wherein the two Marys rehearse roles with a ridiculous dialogue (Ex. 3, pp. 109-110, 121).

Thus, the three aspects of identity between these two pairs of characters are as follows: the fact that each pair consists of two girls with the same given name, the fact that they have contrasting statures, and the fact that in one of their principal scenes they are coupled together in a "play within the play". Each of these elements, referred to almost in passing in the plaintiff's play, is developed and brought into clear relief in the defendants' play.

In the plaintiff's play one of the girls states that she had posed her teeth for an advertisement, that she had previously had caps placed over two of her teeth in order to pose for the movies, and that she felt as though she were being posed as an illustration of the hoof and mouth disease (Ex. 2, Act I, pp. 22-3).

The defendants' play includes a scene in which the leading man examines the star's teeth in order to see

whether she can appear in the movies. He advises her to affix a cap over two of her teeth. The stage directions state that he "opens her mouth and peers in as though she were a race horse" (Ex. 3, p. 161).

The parallelism intrinsic to these scenes is highlighted by the parallelism of their positions in the respective plays. Each directly follows a dialogue in which the star is advised that she lacks the equipment for success in the show business and should quit—in plaintiff's play, by going back home (Ex. 2, Act I, pp. 21-2), in defendants' play, by going into the movies (Ex. 3, p. 161). Although most of the details of that prior dialogue in the plaintiff's play have been discarded for a more pithy presentation in defendants' play, the latter has retained the plaintiff's allusion to Alice in Wonderland (Ex. 2, Act I, pp. 20-1; Ex. 3, p. 158).

In the plaintiff's play, the star's roommate tells the other girls, with affected bravado, that her career is "just beginning" (Ex. 2, Act I, p. 5). A little later the same girl states that she feels "as old as God", but is still trying to make the public accept her as a child actress (Ex. 2, Act, I, p. 12).

These two portions of the plaintiff's play are consolidated into a single colloquy in the defendants' play. The star tells one of the girls that she feels herself to be only at "the beginning" of her theatrical career. The answer of the other girl is sarcastic and reminds the star: "you can't play ingenues forever" (Ex. 3, p. 90).

In each play a reference is made to the large family which one of the girls had left at home (Ex. 2, Act I, p. 29; Ex. 3, p. 73). In each play the reference discloses their straitened financial circumstances (id.). In each play the girl receives bad news about them (Ex. 2, Act I, pp. 28-30; Ex. 3, pp. 10-11).

Each play includes a number of references to parts which the star has received in a number of plays. In no instance are we told the name of the part (Ex. 2, Act I, p. 33; Act II, pp. 16-17; Act III, p. 5; Ex. 3, pp. 28, 133, 204, 228).

Each play contains an instance in which a message is communicated over the telephone for the star who is then absent, in which the one who takes the message forgets to deliver it, and in which the message is then finally delivered late (Ex. 2, Act I, pp. 7, 23; Ex. 3, pp. 144-5, 156-7). Each play includes a satirical allusion to the Club attendant's habit of not communicating telephone messages (Ex. 2, Act I, p. 7; Ex. 3, p. 158).

One of the girls in the plaintiff's play refers to the Club as "this dump heap" (Ex. 2, Act I, p. 5).

In the defendants' play a girl refers to the Club as "this rotten dump" (Ex. 3, p. 89).

In the plaintiff's play, the star's roommate states that she has not seen the star since dawn. The time of this scene is fixed at 10:47½ A. M. (Ex. 2, Act I, p. 5).

In the defendants' play, the girl states that she hasn't seen the star for the reason that "She's gone before I'm awake in the morning" (Ex. 3, p. 26). Now the fact that the statement of this girl was made in the early evening (Ex. 3, p. 3) creates an anachronism which the copyist overlooked. It had been perfectly appropriate for the girl in the plaintiff's play, speaking in the early morning, to rest her ignorance of the whereabouts of her roommate upon the ground that she had left the Club at dawn. But the same explanation became nonsensical when given, as it was in the defendants' play, during the evening; since we know that the girls habitually ate lunch at the Club (Ex. 2, Act I, p. 26; Ex. 3, p. 99). In stating that her ignorance of the star's whereabouts was due to the latter's early rising, the girl should have referred

in some manner to the reason why she had not seen her at lunch.

In the circumstance that the explanation of why she had not seen the star, as given by the girl in the defendants' play was, although a faithful reproduction of a statement in the plaintiff's play, absurd by reason of the time of day at which it was uttered, we have intrinsic evidence of the improbability of its having been an original creation.

At the very beginning of each play, the star's roommate moves out and a new roommate moves in (Ex. 2, Act I, p. 5; Ex. 3, p. 18). In each play the reference to the change of girls includes a particular allusion to the change of paper in the bureau drawers (Ex. 2, Act I, p. 8; Ex. 3, p. 18). Also, each employs a derisive phrase in describing the departure from the Club (Ex. 2, Act I, p. 5; Ex. 3, p. 25).

In each play one of the girls promises and then breaks her promise to bring a dress to one of the other girls "right away" (Ex. 2, Act I, pp. 26-9; Ex. 3, pp. 18-19). The quoted language—"right away"—is repeated verbatim in each play (Ex. 2, Act I, p. 26; Ex. 3, p. 18).

In each play a needy girl refuses the proffer of a loan of money with the phrase "I can't take" the money, etc. The quoted words—"I can't take"—are employed verbatim in each play (Ex. 2, Act I, p. 30; Ex. 3, pp. 82, 138).

Each play depicts a scene in which the star confides to one of the other girls the concern which she feels about her boy friend (Ex. 2, Act III, p. 6; Ex. 3, pp. 79-80). Each depicts a scene in which one of the girls, who is herself destined for suicide, volunteers motherly advice to the star upon the basis of her own tragic experiences (Ex. 2, Act II, p. 15; Ex. 3, p. 79). In each play the star tells

the mothering girl that she likes her boy friend's wild individuality (Ex. 2, Act II, p. 18; Ex. 3, p. 79). Finally, in each of the plays, the essence of the splendid individuality of the boy friend, as exhibited in the eyes of the enamored star herself, appears to be the quality that "he never keeps an appointment" (Ex. 2, Act III, p. 8; Ex. 3, p. 79).

In each play the prospective suicide, after confiding to the star the story of her unhappy marital life, states that her husband has "the legal authority" (Ex. 2, Act II, p. 27); that his wealth makes it impossible for her "to do something legally" (Ex. 3, p. 84).

In each play one of the girls describes the cathartic value of unburdening one's woes to another by stating that it will "do you good" (Ex. 2, Act I, p. 15; Ex. 3, p. 85).

In each play one of the inmates of the Club, in seeking to impress a male visitor with its respectability, refers to it as "this house" (Ex. 2, Act I, p. 38; Ex. 3, p. 33).

Each play describes a situation in which one of the girls states that she had met a certain moving picture producer at a "party", that she had not expected him to remember her, but that it later appeared that he did remember her in fact (Ex. 2, Act I, p. 17; Ex. 3, p. 20).

In each play one of the girls is exhibited as having removed a pair of tight shoes and then going around in her stockinged feet (Ex. 2, Act III, p. 2; Ex. 3, pp. 11, 14).

Each play contains innumerable references to girls who are either going in to dinner or have just missed dinner in the Club dining room (Ex. 2, Act I, pp. 25, 27, 30, 31, 44; Ex. 3, pp. 9, 10, 13, 17, 22, 34, 35, 44, 45, 58, 68).

E. The Parallelism Between the Offstage Characters Referred to in the Two Plays.

In each of the plays the characters on the stage refer to other people, either previously or presently playing a part in their lives, who do not, however, appear on the stage. In order that this final parallelism in the two plays be not overlooked, we shall now couple the persons to whom such allusions are made.

Each play refers to the mother of the star who, frustrated in her own desire for a theatrical career, had projected her daughter into the theatrical world in order to obtain a vicarious fulfillment (Ex. 2, Act I, p. 22; Ex. 3, pp. 81-2).

In each play the star's roommate, whose suicide constitutes the play's true denouement, describes a sadistic playboy husband (Ned, Dick) from whom she had been divorced in the plaintiff's play and had simply run away from in the defendants' play (Ex. 2, Act II, p. 14; Ex. 3, pp. 83-4).

Each play refers to an offstage character who is suffering from a physical malady. In each play a derisive reference is made to the fact that that malady is being attributed by modern psychology to the unconscious impulse to deny life (Ex. 2, Act I, pp. 3-4; Ex. 3, p. 126).

In each play reference is made to the wealthy but difficult in-laws of a girl who ultimately commits suicide. As already stated, there are two suicides in the plaintiff's play, and the girl herein referred to is not the roommate of the plaintiff's star (Ex. 2, Act II, p. 3; Ex. 3, p. 84).

In each play, the incident which acts as the spark for the suicide of the star's roommate is that she had just lost her job. In each play reference is made to the fact that another girl had replaced her, but in neither play is the other girl named (Ex. 2, Act III, p. 12; Ex. 3, p. 137).

We have already described the situation in which the star in each play is "stood up" by her boy friend in or-

der that he may rush back to his office and keep an appointment with his backer and the girl who is to play the part which had originally been designed for the star. The names of the backers and replacing actresses, in the plaintiff's play and in the defendants' play respectively, were Mr. Roper and Mr. Gilman, and Mary Nevins and Natalie Blake (Ex. 2, Act III, pp. 10, 16; Ex. 3, pp. 133, 135).

Each play includes an envious reference to the girl who "made good". Her name is Martha Moore in the plaintiff's play and Laura Wilcox in the defendants' play (Ex. 2, Act I, p. 10; Ex. 3, p. 214).

Each play includes a reference to the big producer (Mr. Tucker in the plaintiff's play and Mr. Berger in the defendants' play) by whom the star had been interviewed immediately prior to her entrance in the first Act (Ex. 2, Act I, p. 15; Ex. 3, pp. 30 *et seq.*). In the plaintiff's play the star fails to get the job, while in the defendants' play she gets it, but loses it upon the play's termination after four performances (Ex. 2, Act I, p. 16; Ex. 3, p. 74). Plaintiff's play specifically refers to the participation of the author and director upon the occasion in which the star lost her job (Ex. 2, Act I, p. 17). In the corresponding situation wherein the defendants' play refers to the closing of the show after four performances, a statement is made to the effect that neither the author nor director came around (Ex. 3, p. 76). In other words, the two paralleling situations which depict the star's loss of her job both refer to the author and director, although they are referred to as present in the plaintiff's play and as absent in the defendants' play.

Each play includes a reference to moving picture companies whose names are manifest mutations of the names of genuine companies. In the plaintiff's play the reference is to Paragon (Paramount) and Warrens (Warner)s. In the defendants' play the reference is to Globe Picture Company, a manifest allusion to World Pictures (Ex. 2, Act II, pp. 11, 12; Ex. 3, p. 19).

At the beginning of each play, a background of despair is fashioned through a reference to a manager who is casting, but whose office had been so crowded with applicants that none of the girls had a chance (Ex. 2, Act I, p. 13; Ex. 3, pp. 6-7).

POINT I.

In a plagiarism suit, where the matter duplicated is so significant or so multiple as to render the supposition of a coincidence inconceivable, the Court will, despite the absence of direct testimony of copying, reverse a judgment in favor of the defendants, direct the entry of judgment in favor of the plaintiff, and remand the cause to the lower Court for proceedings necessary to fix damages, attorneys' fees, etc.

College Entrance Book Co., Inc. v. *Amsco Book Co., Inc.*, 119 Fed. (2nd) 874;

General Drafting Co., Inc. v. *Andrews et al.*, 37 Fed. (2nd) 54;

Sheldon et al. v. *Metro-Goldwyn Pictures Corporation, et al.*, 81 Fed. (2nd) 49, cert. den. 298 U. S. 669.

The judgment appealed from should be reversed, judgment should be entered in favor of the plaintiff-appellant with appropriate findings and conclusions, and the cause should be remanded to the District Court with instructions for the assessment of plaintiff's damages, the fixing of attorneys' fees, etc.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 403

MADGE CHRISTIE,

Petitioner,

against

GEORGE M. COHAN, IRVING BERLIN, DENNIS F. O'BRIEN, Executors, and KATHLEEN NOLAN HARRIS, Executrix of the Estate of SAM H. HARRIS, GEORGE S. KAUFMAN and EDNA FERBER,

Respondents.

ON APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

This action is one for infringement of copyright. The plaintiff alleges that the play "Stage Door," written by the defendants Edna Ferber and George S. Kaufman, and produced on the stage by Sam H. Harris, now deceased, is an infringement upon plaintiff's copyright in her play "Thru the Looking Glass."

After trial, the District Court for the Southern District of New York (Judge CONGER) dismissed the complaint against all defendants (47 F. Supp. 39; R. 67-90). Upon appeal, the Circuit Court of Appeals for the Second Circuit

(L. HAND, SWAN and CLARK, Circuit Judges), writing *per curiam*, affirmed the judgment of the District Court (154 Fed. (2d) 827).

The issues of fact herein, of copying and material appropriation, were resolved by the District Court against the plaintiff (98-102). The District Court held that the defendant authors never had access to plaintiff's play and never copied therefrom, and that both plays were entirely dissimilar (98-99). The District Court held that there was a failure both of direct proof of access (73-74) and of indirect proof through alleged similarities between the two plays. As the District Court said:

> "I have to admit that I find no such evidence of similarities which would lead me to believe that defendants used plaintiff's play when they wrote theirs. As a matter of fact, I find more differences than resemblances, and I therefore must hold that plaintiff has failed to make out a case" (79-80).

Upon appeal to the Circuit Court, plaintiff submitted a brief almost identical with that now submitted in support of the petition for certiorari. The same set of spurious and belabored "similarities" that had been rejected by the District Court (76-79) were presented to the Circuit Court in digested version. The nature of plaintiff's claims are typified by her assertion, for example, that Edna Ferber and George S. Kaufman, two of the foremost American playwrights, experienced in dialogue and expression, resorted to her play to steal such words as " 'em," "beginning," "dump," "right away," "do you good," "this house," and "period" and extracted the evidently unique phrase "I can't take" from a sentence uttered by one character in plaintiff's play and transplanted it into an entirely different sentence in a different scene and into the mouth of a different character in "Stage Door." These absurd claims reappear in petitioner's present brief (pp. 24-29). These claims as well as other alleged claims of

similarity—in theme, characters, incidents, situations and events—which were completely rejected by the District Court, were again rejected by the Circuit Court.

The Circuit Court, after reviewing the record and reading the plays, held that a comparison of the plays did not even create a "tentative inference" of copying and that "we . . . do not find the slightest basis in them for disbelieving the authors' disclaimers." As the Circuit Court concluded:

> "In order to suppose that these two highly experienced and successful authors should have found in the plaintiff's play cues for the far-fetched similarities which she discovers, one must be obsessed, as apparently unsuccessful playwrights are commonly obsessed, with the inalterable conviction that no situation, no character, no detail of construction in their own plays can find even a remote analogue except as the result of piracy. 'Trifles light as air are to the jealous confirmations strong as proof of holy writ' " (154 Fed. (2d) 827-828).

Once again, however, plaintiff has brought forth the same set of "far fetched similarities." Her brief constitutes a presentation of the same twisted, tortured and twice rejected view of the evidence. Essential differences between the two plays are either happily ignored in plaintiff's brief, or misleading generalizations are employed to create an illusion of similarity where none in fact exists. "With this method of resolving troublesome differences, hardly any drama since the 'Garden of Eden' could survive the charge of plagiarism." (J. CLARK, in *Rose* v. *Connelly*, 38 F. Supp. 54, 56.)

We respectfully submit that plaintiff imposes upon this Court when she once again submits a fabricated analysis of the plays almost verbatim with that submitted to the Circuit Court and similar in nature to that submitted to the District Court. The defendants feel that they would

be a party to such imposition if they were once again to analyze and refute plaintiff's brief in detail.

This Court has repeatedly said that it is not the purpose of a writ of certiorari to review the evidence. Plaintiff has attempted to obtain such review under the guise that a question of "appellate procedure upon which a question of substantive law directly depends" is before this Court for determination. This alleged question is as "far fetched" as plaintiff's alleged similarities. No such question is present. The question before this Court is a simple one. Shall this Court review the evidence upon which issues of fact have previously been decided by the lower courts? This Court has repeatedly replied in the negative, and it is respectfully submitted should do so once again by denying plaintiff's petition for a writ of certiorari.

Summary of Argument

(1) That in a plagiarism action, the plaintiff must prove copying and material appropriation, both of which are issues of fact. In the instant case, both of these issues of fact were decided against the plaintiff upon more than ample evidence. (2) That the Supreme Court will not grant a writ of certiorari where only issues of fact are involved.

POINT I

In a plagiarism action, plaintiff must prove copying and material appropriation, both of which are issues of fact. In the instant case both of these issues of fact were decided against the plaintiff upon more than ample evidence.

The Circuit Court of Appeals for the Second Circuit recently again set forth the component ingredients of an action for plagiarism.

In *Heim* v. *Universal Pictures Co., Inc.*, 154 F. (2d) 480, 487 (1946), the Court said:

> "In a suit like this, plaintiff, to make out his case, must establish *two separate facts:* (a) that the alleged infringer copied from plaintiff's work, and (b) that, if copying is proved, it was so 'material' or 'substantial' as to constitute unlawful appropriation." (Emphasis ours.)

Again, in *Arnstein* v. *Porter*, 154 Fed. (2d) 464, 469 (1946), the same Court said:

> *"Each of these two issues—copying and improper appropriation—is an issue of fact.* If there is a trial, the conclusions on those issues of the trier of the facts —of the judge if he sat without a jury, or of the jury if there was a jury trial—bind this Court on appeal, provided the evidence supports those findings, regardless of whether we would ourselves have reached the same conclusions." (Emphasis ours.)

The District Court saw and heard the parties in a two-day trial and found that Ferber and Kaufman did not have access to or copy from plaintiff's play and that there had been no appropriation thereof.

The record indicates that Ferber and Kaufman had extensive experience as playwrights (478-491; 649-668); that each had received the Pulitzer Prize (481-482; 655-656); and that both had previously collaborated on plays dealing with the theatre (486-489). Both authors gave a complete and candid genesis and history of their independent conception and writing of "Stage Door" (494-500; 669-671); they told how the background of the play was based on their own personal and familiar experiences (415-416; 445-446); both denied their having seen or heard of plaintiff's script (505-506; 671-672), nor did plaintiff claim to have submitted it to them (161-162). Plaintiff's script had been submitted

to Harris in routine fashion but this submission did not result in its being read or seen by either of the authors (504, 673-674, 763-764, 781-782).

The District Court therefore said:

> "There is nothing to warrant my finding that he (Harris) ever showed the manuscript of the play to defendants Ferber and/or Kaufman" (74); and found that neither of the defendants Ferber or Kaufman ever heard of, read or had a copy of the plaintiff's play in their possession (98-99).

As for the plays themselves, the District Court said, "In the large aspect, I find the two plays entirely dissimilar" (82). A simple summary of both plays (something which plaintiff has consistently and does still refuse to set forth) will readily disclose the vast differences between them.

"Stage Door" is a finished play with a well-defined theme. The theme is the struggle of the young actress to gain a place in the theatre, and the competition of the screen to woo her away. The scene of the entire play is the Footlights Club, a sort of theatrical boarding house for young girls with stage aspirations. The heroine is Terry Randall, and the play is principally concerned with her efforts to make good. The other characters—Terry's roommate, Jean Maitland, who later becomes a "glamour girl" of the screen; Keith Burgess, the radical playwright who sells out to Hollywood; David Kingsley, the prodigal who returns to the theatre—are used to highlight and emphasize Terry's single-hearted purpose and devotion to the stage.

The trials and tribulations of the other girls at the Footlights Club—the pianist who has to play swing; Kaye who seeks the theatre as an escape from an infamous husband; Linda whose choice of "the easiest way" leads to her disfigurement for life; the world-weary Judy; the Southern belle, and all the others—are varicolored threads woven to-

gether to create a rich and teeming tapestry of the Broadway theatre.

"Stage Door" is a play about the theatre; its locale was dictated by its very theme; its dramatis personae had to be aspiring actresses and playwrights; its point would have been lost if other people or another place had been used.

It is difficult to find the theme of "Through the Looking Glass." Insofar as it can be said to have any, it is that some individuals—perhaps most—have an aptitude for messing up their lives. The fact that theatrical people were chosen to make this point is entirely fortuitous. Persons in any other walk of life might have been selected, and the basic observation would have been no less valid.

The two women—Elizabeth Thomas and Cleo Norton—whose careers are recounted to illustrate the truism, are not bright-cheeked novices of the stage, and the heartbreak they suffer is not the heartbreak implicit in the hardships and discouragements of the young. Quite the reverse. Elizabeth Thomas is an actress past her prime; she was once a star, but now is heading downgrade. Her last show was a failure. Her first marriage went on the rocks, and she lost custody of her children. Her second husband died, and the administration of his estate plunged her into vexatious litigation. Her current lover is a drunkard and a wastrel. Profoundly discouraged, she shoots her lover and commits suicide.

Cleo, too, is an established actress. She has had "extraordinary success" on the screen. She is variously described as sophisticated, selfish, neurotic, vicious and devoid of sexual restraint. She is addicted to drugs, and dies of an overdose under circumstances which suggest suicide.

At the end of the play, the tragedy of Elizabeth and Cleo is supposed to have a sobering effect on Billie-Katherine (an erstwhile stage aspirant, but now an expectant

mother) and her husband, Bob Wainwright (a "fascinating, debonair" young playwright who has been hitting the bottle and frittering away his talents on plays of no consequence), with the result that they resolve to build something finer out of their lives.

The first act is laid in the Drama Club, a hostelry for young actresses. The second act takes place in Elizabeth Thomas' living room, the third in Billie-Katherine's bedroom. The use of the Drama Club as locale is incidental; it is of no import or significance as regards the message of the play.

It is obvious that both plays are completely dissimilar. Certainly, the alleged similarities fall far short of meeting the requirements of the applicable test of comparison when proof of access is lacking. The District Court stated the test as follows:

> "Where similarities or identities are relied upon they must do more than engender suspicion of piracy, they must establish piracy with reasonable certainty" (75).

In applying the foregoing rule, the District Court said:

> "I find little in common, at least anything of substance, in the stories told by the two plays, in the motivation of the characters, in the plot, in complication nor in dramatic conflicts" (88).

The Circuit Court stated the rule in the instant case:

> "In such a setting nothing should move us to hold that the finding (of no access) was plainly wrong except a parallelism between the plays which admits of no innocent explanation."

And the Court then stated:

> "We have read them both, and do not find the slightest basis in them for disbelieving the authors' disclaimers" (154 Fed. (2d) 827).

Dismissal of the complaint was therefore based upon ample evidence and involved only issues of fact which were determined in favor of the defendants.

POINT II

Where only issues of fact are involved a writ of certiorari will be denied.

Plaintiff's petition does not fall within any of the categories set forth in the Supreme Court Rules (Rule 38 (5)b) as grounds for granting a writ of certiorari, and nowhere does plaintiff even make claim that it does.

The general purpose of the writ of certiorari is to resolve an important question of Federal law which may be in the public interest or to remove a conflict among Circuit Courts of Appeals. The writ of certiorari may not be availed of by a party who merely seeks to procure another hearing of his case.

As stated by this Court in the case of *Magnum Import Company* v. *Coty*, 262 U. S. 159, at page 163, in which petitions for writs of certiorari were denied:

> "The question how the Court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes; first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

As Justice HOLMES stated in *United States* v. *Johnston*, 268 U. S. 220, 227, 69 Lawyers Ed. 925, 45 Sup. Court 496:

"We do not grant a certiorari to review evidence and discuss specific facts."

In *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U. S. 175, 178, 82 Lawyers Ed. 1275, 58 Sup. Court 849 (1938), the Court stated:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

See, also, *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 68 Lawyers Ed. 413, 44 Supreme Court 163 (1923).

Conclusion

All that plaintiff is seeking by her petition for a writ of certiorari is a review of evidence upon which issues of fact have been resolved against her by the District Court and the Circuit Court of Appeals. This Court has said that such review is not the function of the writ.

Respondents therefore respectfully submit that the petition for a writ of certiorari should be denied, with costs.

Respectfully submitted,

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